

①
88-27
No. _____

Supreme Court, U.S.
FILED
JUL 6 1988

JOSEPH E. SPANIOLO, JR.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

RUSCO INDUSTRIES, INC.,

Petitioner,

v.

ANN McLAUGHLIN, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,

Respondent.

On Petition For Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

A. STEPHENSON WALLACE
BUSH, WALLACE & CRAIG, P.C.
462 Telfair Street
Augusta Georgia 30901
(404) 722-7574

Counsel for Petitioner



QUESTION PRESENTED FOR REVIEW

The Bankruptcy Code, 11 U.S.C. §101 (1978), *et seq.*, establishes a scheme of payment priorities for funds of the bankruptcy estate. The Fair Labor Standards Act of 1938, 29 U.S.C. §201 (1938), *et seq.*, grants to the Secretary of Labor injunctive power to stop violations of the Act by requiring an employer to pay wages to remove the "taint" from manufactured goods before those goods can be sold. The question presented is whether the provisions of the Fair Labor Standards Act of 1938 prevail over the Bankruptcy Code and require a trustee in bankruptcy to pay out funds contrary to the payment priority scheme established by the Bankruptcy Code.

**PARTIES TO THE PROCEEDINGS
IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

1. Rusco Industries, Inc., the debtor corporation, and its wholly-owned subsidiaries: Rusco California, Inc., Pacific Securities Transfer, Inc., Sperling Manufacturing, Inc., and Rusco/Hilite Building Products, Inc. All of these entities are in bankruptcy and their court-appointed trustee is A. Stephenson Wallace.

2. Ann McLaughlin, substituted as plaintiff for William E. Brock, resigned, Secretary of Labor, United States Department of Labor.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OFFICIAL REPORTS OF OPINION BELOW	1
STATEMENT OF THE GROUNDS FOR JURISDICTION ...	1
STATUTES INVOLVED	2
STATEMENT OF THE CASE	6
(a) Introduction	6
(b) Statement of Facts	6
(c) Proceedings Below	7
ARGUMENT	8
A. THE COMPLAINT FILED BY THE SECRETARY VIOLATES §362 OF THE BANKRUPTCY CODE IN THAT IT GOES FURTHER THAN ENFORCEMENT OF THE GOVERNMENT'S "POLICE OR REGULATORY POWER."	8
B. THE PURPOSES OF THE FAIR LABOR STANDARDS ACT ARE NOT FURTHERED BY ENFORCING IT AGAINST A BANKRUPTCY ESTATE	11
C. CONCLUSION	12

TABLE OF AUTHORITIES

CASES:	Page
<i>Brock v. Ely Group, Inc.</i> , 788 F.2d 1200 (6th Cir. 1986), <i>aff'd sub nom, Citicorp Industrial Credit, Inc. v. Brock</i> , 107 S.Ct. 2694 (1987) ..	11,12
<i>Brock v. Rusco Industries, Inc.</i> , 842 F.2d 270 (11th Cir. 1988)	1,9
<i>Citicorp Industrial Credit, Inc. v. Brock</i> , ___ U.S. ___, 107 S.Ct. 2694, 97 L.Ed.2d 23 (1987) ..	11
<i>E.E.O.C. v. Rath Packing Co.</i> , 787 F.2d 318 (8th Cir. 1986), <i>cert. denied</i> , ___ U.S. ___, 107 S.Ct. 307, 93 L.Ed.2d 282 (1986)	10
<i>N.L.R.B. v. Evans Plumbing Co.</i> , 639 F.2d 291 (5th Cir. 1981)	10
<i>Penn Terra Ltd. v. Department of Environmental Resources</i> , 733 F.2d 267 (3rd Cir. 1984)	10
STATUTES:	
Bankruptcy Code, 11 U.S.C. §101 (1978), <i>et seq.</i> ..	3,6
11 U.S.C. §362	3,8,12
11 U.S.C. §362(a)(1)	8
11 U.S.C. §362(b)(4)	9
11 U.S.C. §507	9
Fair Labor Standards Act of 1938, 29 U.S.C. §201 (1938), <i>et seq.</i>	2,6
29 U.S.C. §215	2
29 U.S.C. §217	1,2
28 U.S.C. §1254(1)	1
28 U.S.C. §1334	1
28 U.S.C. §2101(c)	1
MISCELLANEOUS:	
124 Congressional Record H11089, U.S. Code Cong. Admin. News 1977, 660-661	10

OFFICIAL REPORTS OF OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit, reported under the name *Brock vs. Rusco Industries, Inc.*, is found at 842 F.2d 270 (11th Cir. 1988). The orders of the United States District Court for the Southern District of Georgia and the United States Bankruptcy Court for the Southern District of Georgia are unreported.

Copies of the above opinion and orders are included in the Appendix to this Petition.

STATEMENT OF THE GROUNDS FOR JURISDICTION

The judgment sought to be reviewed was entered April 11, 1988, by the United States Court of Appeals for the Eleventh Circuit. The jurisdiction of the United States District Court for the Southern District of Georgia is based upon 29 U.S.C. §217 and 28 U.S.C. §1334.

The within Petition for Writ of Certiorari is presented within ninety (90) days pursuant to 28 U.S.C. §2101(c) and this Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

1. §§215 and 217 of the Fair Labor Standards Act of 1938, 29 U.S.C. §201, *et seq.*, provide in pertinent part as follows:

§215:

(a) After the expiration of one hundred and twenty days from June 25, 1938, it shall be unlawful for any person—

(1) to transport, offer for transportation, ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 206 or section 207 of this title, or in violation of any regulation or order of the Administrator issued under section 214 of this title; except that no provision of this chapter shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business any goods not produced by such common carrier, and no provision of this chapter shall excuse any common carrier from its obligation to accept any goods for transportation, offer, shipment, delivery, or sale of such goods by a purchaser who acquired them in good faith in reliance on written assurance from the producer that the goods were produced in compliance with the requirements of this chapter, and who acquired such goods for value without notice of any such violation, shall not be deemed unlawful;

(2) to violate any of the provisions of section 206 or section 207 of this title, or any of the provisions of any regulation or order of the Administrator issued under section 214 of this title;

§217:

The district courts, together with the United States District Court for the Southern District of the Canal Zone, the District Court of the Virgin Islands, and the District Court of Guam shall have jurisdiction, for cause shown, to restrain violations of section 215 of this title, including in the case of violations of section 215(a)(2) of this title the restraint of any withholding of payment of minimum wages or overtime compensation found by the court to be due to employees under this chapter (except sums which employees are barred from recovering, at the time of the commencement of the action to restrain the violations, by virtue of the provisions of this title);

2. §362 of the Bankruptcy Code, 11 U.S.C. §101, *et seq.* provides in pertinent part as follows:

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title [11 USCS §301, 302, or 303], or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a)(3)) [15 USCS §78333(a)(3)], operates as a stay, applicable to all entities, of—

(1) the commencement or continuation, including the issuance or employment of proc-

ess, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title [11 USCS §§ 1 et seq.], or to recover a claim against the debtor that arose before the commencement of the case under this title [11 USCS §§ 1 et seq.];

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title [11 USCS § 1 et seq.];

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title [11 USCS § 1 et seq.];

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title [11 USCS § 1 et seq.];

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title [11 USCS § 1 et seq.] against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor.

(b) The filing of a petition under section 301, 302, or 303 of this title [11 USCS §301, 302, or 303], or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78333(a)(3)) [15 USCS §78eee(a)(3)], does not operate as a stay—

(1) under subsection (a) of this section, of the commencement or continuation of a criminal action or proceeding against the debtor;

(2) under subsection (a) of this section, of the collection of alimony, maintenance, or support from property that is not property of the estate;

(3) under subsection (a) of this section, of any act to perfect an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) of this title [11 USCS §546(b)] or to the extent that such act is accomplished within the period provided under section 547(e)(2)(A) of this title [11 USCS §547(e)(2)(A)];

(4) under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

(5) under subsection (a)(2) of this section, of the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

STATEMENT OF THE CASE

(a) Introduction

The issue before the Court presents a conflict between the Fair Labor Standards Act of 1938, 29 U.S.C. §201, *et seq.*, and the Bankruptcy Code, 11 U.S.C. §101, *et seq.* The Fair Labor Standards Act empowers the Secretary of Labor to seek an injunction prohibiting the sale of "tainted" goods, i.e., goods manufactured in violation of the Act. In order to sell the goods, the "taint" must be removed by paying to the Secretary a sum sufficient to cure the violation of the Act. In this case, that sum equals the minimum wage for workers who were unpaid for two weeks prior to the filing of a petition in bankruptcy. This results in a conflict between the two statutes since the payment to the Secretary for the benefit of unpaid workers is in derogation of the priority of payments scheme in the Bankruptcy Code.

(b) Statement of Facts

Rusco Industries, Inc., is a Delaware corporation which had been engaged in the manufacture of doors and windows. It operated facilities in Millen, Georgia, Santa Fe Springs, California, and Meadville, Pennsylvania. Rusco employed approximately 150 persons at these locations. The company began encountering severe financial difficulty in the latter part of 1985, which resulted in its line of credit begin terminated in late January, 1986. The company and its wholly owned subsidiaries filed for reorganization under Chapter 11 of the Bankruptcy Code on February 3, 1986. During the approximate period between January 20, 1986 and the date of filing, Rusco's employees received no pay for work performed during that period.

(c) Proceedings Below

On February 21, 1986, the Secretary of Labor filed a complaint against Rusco pursuant to Section 17 of the Fair Labor Standards Act alleging a violation by failure to pay its employees the applicable minimum wage and further seeking an injunction to enjoin Rusco from shipping, delivering, or selling goods in interstate commerce that had been produced in violation of the Act. The injunction was granted by the district court on March 20, 1986. The injunction was thereafter modified to allow Rusco to sell inventory in its possession upon the condition that the proceeds from the sale be deposited into the registry of the district court. On May 20, 1986, the district court entered an order transferring the case to the bankruptcy court and directing that the funds held in the court's registry should be disbursed according to future order of the bankruptcy court. *See* Appendix "A" attached hereto.

The Secretary then filed a motion with the bankruptcy court seeking the disbursement of funds to him. The disbursement was sought for the purpose of reimbursing employees and to remove the "taint" from Rusco's "hot goods." The bankruptcy trustee (who had been appointed subsequent to the filing of the Secretary's complaint) opposed the motion for disbursement. On November 7, 1986, the bankruptcy court entered an order denying the Secretary's motion for disbursement and directing that the proceeds held in the district court's registry be turned over to the trustee for disbursement according to the priorities of the Bankruptcy Code. *See* Appendix "B" attached hereto.

On November 13, 1986, the district court entered an order adopting the opinion of the bankruptcy court, dissolving the injunction, and dismissing the Secretary's action in its entirety. *See* Appendix "C" attached hereto. The Secretary filed an appeal with the United States Court of Appeals for the Eleventh Circuit, the case was briefed and argued, and the Eleventh Circuit Court of Appeals entered its judgment on April 11, 1988. *See* Appendix "D" attached hereto.

ARGUMENT

Under the facts of this case, there is an irreconcilable conflict between provisions of the Bankruptcy Code and the Fair Labor Standards Act. The Eleventh Circuit Court of Appeals has erroneously held that the Fair Labor Standards Act prevails over the Bankruptcy Code. Such a result is not consistent with congressional intent in enactment of either statute.

A. THE COMPLAINT FILED BY THE SECRETARY VIOLATES §362 OF THE BANKRUPTCY CODE IN THAT IT GOES FURTHER THAN ENFORCEMENT OF THE GOVERNMENT'S "POLICE OR REGULATORY POWER."

The Secretary's "hot goods" complaint was filed subsequent to the filing of Rusco's petition in bankruptcy. §362 of the Bankruptcy Code generally prohibits the filing of an action against the debtor that could have been commenced before the commencement of the case, or the filing of an action to recover a claim against the debtor that arose before commencement of the bankruptcy case. §362(a)(1). Rusco's employees were not paid for work performed prior to filing and there are no allegations that employees have gone unpaid since the filing.

An exception to the stay is found in §362(b)(4), which specifically allows an action to enforce a governmental unit's "police or regulatory power." The question presented by this case is whether or not the government's interest falls under this exception. The Eleventh Circuit held that the Secretary "brought the suit to protect legitimate businesses from unfair competition and to enforce the federal law regarding minimum wage." 842 F.2d at 273. Therefore, the Eleventh Circuit found that the suit was one brought under the government's police power. However, the undeniable effect of allowing the filing and requiring the bankruptcy trustee to pay the Secretary is to prefer one set of creditors of the bankruptcy estate over all other creditors of the estate. Such a preference as to creditors violates the priority of payments scheme of §507 of the Bankruptcy Code, 11 U.S.C. §507 (1978). This preference raises the question as to whether the government's interest is "police or regulatory" or "pecuniary," i.e., an action seeking to recover money or other assets of the bankruptcy estate. §362(b)(4) of the Bankruptcy Code should not and does not apply when the interest of the governmental unit is solely "pecuniary." The intent of Congress in enacting §362(b)(4) was explained by Don Edwards, Chairman of the Subcommittee on Civil and Constitutional Rights to the House Committee of the Judiciary as follows:

' "Section 362(b)(4) indicates that the stay under Section 362(a)(1) does not operate to affect the commencement or continuation of an action or proceeding by a governmental unit to enforce the governmental unit's police or regulatory power.

“This section is intended to be given a narrow construction in order to permit the governmental units to pursue actions to protect the health and welfare and not to apply to actions by a governmental unit to protect a pecuniary interest in property of the debtor or property of the estate.” 124 Congressional Record H11089, U.S. Code Cong. Admin. News 1977, 660-661 reprinted in 1978. [Emphasis supplied]”

The cases cited by the Eleventh Circuit in support of its holding are readily distinguishable. In *N.L.R.B. v. Evans Plumbing Co.*, 639 F.2d 291 (5th Cir. 1981), the Fifth Circuit did in fact hold that the NLRB proceeding was within the police or regulatory exception to §362. However, it specifically stated that it was not deciding the question as to whether or not the back pay award could be enforced against the bankruptcy estate. 639 F.2d at 293. Similarly, in *E.E.O.C. v. Rath Packing Co.*, 787 F.2d 318 (8th Cir. 1986), *cert. denied*, — U.S. —, 107 S.Ct. 307, 93 L.Ed.2d 282 (1986), the Eighth Circuit held that the proceeding was police or regulatory, but actually overturned the lower court's order setting up a detailed payment plan, holding that the EEOC claim could not be given preference over other creditors. 787 F.2d at 326-327. Finally, the Third Circuit in *Penn Terra, Ltd. v. Department of Environmental Resources*, 733 F.2d 267 (3rd Cir. 1984), did require the bankruptcy estate to spend funds to clean up pollution. The funds, however, were not paid, either directly or indirectly, to a creditor of the estate in violation of the priority scheme of the Bankruptcy Code. Thus, *Penn Terra* and the other cases cited by the Eleventh Circuit

never go as far as the Eleventh Circuit has gone in the case below: requiring the bankruptcy estate to pay out funds which prefer one class of creditors over all others.

B. THE PURPOSES OF THE FAIR LABOR STANDARDS ACT ARE NOT FURTHERED BY ENFORCING IT AGAINST A BANKRUPTCY ESTATE.

This Court recently explored the purposes behind enactment of the Fair Labor Standards Act in *Citicorp Industrial Credit, Inc. v. Brock*, ___ U.S. ___, 107 S.Ct. 2694, 97 L.Ed.2d 23 (1987). In holding that a secured creditor was a "person" subject to the Act,¹ this Court pointed out that among the aims of the Act was the elimination of the competitive advantage enjoyed by goods produced under substandard conditions. 107 S.Ct. at 2700. It is submitted that any competitive advantage which might have been enjoyed by Rusco's goods produced in violation of the Act vanished when Rusco filed for bankruptcy. As Judge Engel stated in his dissent in *Brock v. Ely Group, Inc.*, 788 F.2d 1200 (6th Cir. 1986), *aff'd sub nom, Citicorp Industrial Credit, Inc. v. Brock*, 107 S.Ct. 2694 (1987):

"The practical effect of the majority's decision is not to remove any tainted goods from competition for, as happened here, almost always the result will be that the goods are sold, if not in foreclosure, then in bankruptcy, or by other attaching creditors. As here, the goods will go out in the market,

¹ This Court specifically held that the issue of the operation of the Bankruptcy Code in the *Citicorp* factual situation was not before it. 107 S.Ct. 2701, footnote 10.

but whether they are sold for competitively destructive prices will not depend on the cost of their production but upon the manner of their sale in any event."

788 F.2d at 1207 (footnote omitted). Thus, the aim of the Fair Labor Standards Act to eliminate competitive advantage is really meaningless in a bankruptcy setting for basically two reasons: 1) the goods are normally sold in a forced sale for a price which has no bearing on the cost of production; and 2) any unfair "profit" made by the company because it did not pay employees goes into the pool of funds to be administered under the Bankruptcy Code, and there is no more damage to competition than there would otherwise be in a bankruptcy setting where all workers had been paid.

CONCLUSION

Obviously, Congress has not specifically addressed the interplay between the Bankruptcy Code and the Fair Labor Standards Act as presented in this case. However, Congressional intent that a bankruptcy estate be strictly administered according to the statute without interference from a governmental unit is clearly addressed in §362 of the Bankruptcy Code and in the remarks of Representative Edwards, *supra*. This clear intent, coupled with the showing that the intent of the Fair Labor Standards Act is not really advanced by the holding of the Eleventh Circuit, mandates that this Court grant the Petition for Writ of Certiorari to consider and act upon the important question presented by this case.

Respectfully submitted,

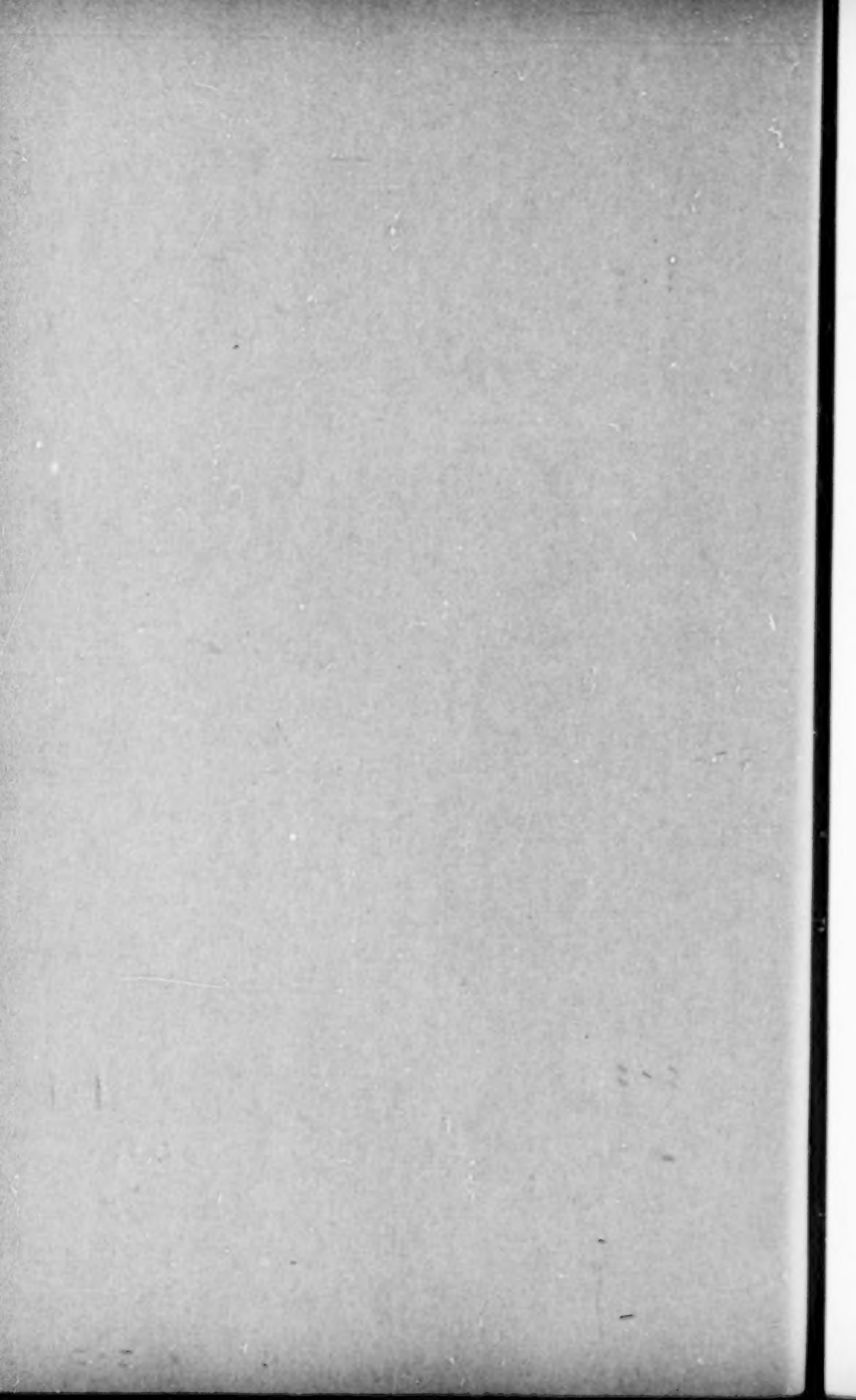
A. STEPHENSON WALLACE

OF COUNSEL:

BUSH, WALLACE & CRAIG, P.C.
462 Telfair Street
Augusta, Georgia 30901
(404) 722-7574



APPENDIX



APPENDIX "A"

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF GEORGIA
STATESBORO DIVISION

WILLIAM E. BROCK)	
Secretary of Labor,)	
United States Department)	
of Labor,)	
)	
<i>Plaintiff,</i>)	
)	
vs.)	CIVIL ACTION
)	CV686-025
RUSCO INDUSTRIES, INC.,)	
)	
<i>Defendant.</i>)	

ORDER

The captioned case seeking injunctive relief actually is one which seeks a distribution for wage claimants from the estate and assets of a Chapter 11 bankruptcy debtor. The plaintiff Secretary seeks in this litigation to enhance the priority position of the wage claimants which has been specifically set by the Congress in the Bankruptcy Code. I have maintained this as an active file, negotiating frequently with the lawyers long enough to assure myself of a fair and lawful result.

The rights of a class of creditors cannot be separately dealt with by a federal district judge and by a bankruptcy judge. The priority and timing of distributions from the debtor must be governed by the Bankruptcy Code.

Accordingly, this case is transferred to the Honorable Herman W. Coolidge, Bankruptcy Judge, and the Clerk of this Court shall disburse the funds in the registry of this Court according to the order of Judge Coolidge.

ORDER ENTERED at Savannah, Georgia, this 27th day of May, 1986.

/s/ DUDLEY H. BOWEN, JR.

UNITED STATES DISTRICT JUDGE

APPENDIX "B"

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE
SOUTHERN DISTRICT OF GEORGIA
Statesboro Division

In the matter of:)
)
RUSCO INDUSTRIES, INC.) Chapter 11 Case
)
<i>Debtor</i>) Number <u>686-00031</u>

ORDER

William E. Brock, Secretary of Labor, United States Department of Labor, has moved this Court to disburse to the Department of Labor certain funds held by the Clerk of the United States District Court for the purpose of reimbursing employees of Rusco Industries, Inc. for wages earned and for other purposes. The matter came on to be heard on October 8, 1986.

FINDINGS OF FACT

The facts in the instant case are essentially undisputed. Rusco Industries, Inc., filed for relief under Chapter 11 of the Bankruptcy Code on February 3, 1986. Post-filing, the Secretary of Labor filed a complaint in the United States District Court for the Southern District of Georgia alleging that Rusco had violated the minimum wage provisions of the Fair Labor Standards Act, 29 U.S.C. §201, *et seq.*, by failing to pay its employees for work actually performed. Rusco's failure to pay its employees occurred prior to the filing of the Chapter 11 proceedings. The Secretary also filed a motion for a temporary restraining order and preliminary injunction, requesting that the Dis-

trict Court enjoin and restrain Rusco from transporting, shipping, delivering, or selling goods produced by it in violation of the Fair Labor Standards Act. The District Court granted the request and Rusco was so restrained. Subsequently, the District Court issued another Order allowing Rusco to sell certain inventory and requiring it to deposit the proceeds into the registry of the District Court, pending a determination of how those proceeds should be disbursed. At least \$190,868.07 has been deposited in the District Court's registry in an interest-bearing account.¹

On May 28, 1986, the District Court entered an Order transferring the case to this Court, and directing that the funds on deposit be disbursed according to the Order of this Court. The Secretary of Labor subsequently filed a Motion for Disbursement of Funds, requesting that the funds be disbursed to him. This Court Ordered all interested parties to respond to the Secretary's Motion. The Trustee, who had been appointed in the Chapter 11 case on May 2, 1986, filed a response opposing disbursement of the funds to the Secretary, which response was adopted by counsel for the prior Debtor-in-possession, and by AMR Group, Inc., a secured creditor in the case.

CONCLUSIONS OF LAW

The purpose of the Fair Standards Act is to insure that workers receive a minimum wage for work performed. The Act provides that an employer who has not paid the minimum wage may be enjoined from selling the goods produced in violation of the Act. The injunction provision of the Act forces an employer into compliance by essentially

¹ By an Order dated August 26, 1986, this Court allowed the Trustee to conduct a sale of certain inventory of the Debtor Corporation located in California. It was Ordered that the proceeds of that sale attributable to the sale of inventory also be deposited into the registry of the District Court.

stopping sales until the Act is complied with.² The Secretary of Labor's argument that the funds on hand should be paid to him centers around characterizing the payment as a payment necessary to dissolve the injunction. The Secretary argues that the payment to him would not be a payment of wage claims in bankruptcy, but "are the sums required to remedy the FLSA violation." *Donovan v. TMC Industries*, 25 WH Cases 829, 836 (N.D. Ga. 1982). All parties concede, however, that the Secretary would use the money to pay the unpaid workers to the extent of the minimum wage.

The Trustee argues that to pay the funds to the Secretary violates the priority scheme outlined in §507 of the Bankruptcy Code. He further argues that the payment to the Secretary defeats the intent of the Bankruptcy Code that the Bankruptcy Code have total and ultimate authority over the assets of the Debtor. In this regard, the Court finds that these funds are "property of the estate" under §541 of the Bankruptcy Code.

The issue in this case is whether or not the Bankruptcy Code or the Fair Labor Standards Act should prevail in deciding what happens to these funds. The Supreme Court of the United States, in *NLRB v. Bildisco & Bildisco*, 104 S.Ct. 1188, 79 L.Ed.2d 8482 (1984), decided the issue of whether or not the National Labor Relations Board could find a debtor guilty of unfair labor practice for unilaterally rejecting or modifying a collective-bargaining agreement before formal rejection of that agreement by the Bankruptcy Court. The Supreme Court, in deciding that the NLRB could not do so, recognized that enforcement of §8(d) of the National Labor Relations Act requiring the

² It is doubtful that the injunction remedy in this case is either effective or proper. Rusco had ceased operations when the injunction was requested, has not produced goods since then, and no plan of reorganization has yet been put forward which proposes a re-start of production and sales.

Debtor-in-possession to bargain collectively conflicted directly with the Debtor's right to reject the collective-bargaining agreement under the provisions of the Bankruptcy Code providing for the rejection of executory contracts. While the NLRB's action was nominally an action to enforce §8(d), the practical effect of the action was to require the Debtor to adhere to a collective-bargaining agreement which was no longer immediately enforceable by virtue of the filing of the petition in bankruptcy.

In the instant case, the practical effect of requiring the Trustee to pay the funds to the Secretary of Labor is to prefer one group of creditors of the estate over another. This is directly contrary to the Bankruptcy Code in which Congress sought not to prefer one creditor over another, but devised a scheme of priorities of payment among creditors of the estate. See Bankruptcy Code §507 (11 U.S.C. §507).

The Secretary relies on *Donovan v. TMC Industries*, 25 WH Cases 829 (N.D. Ga. 1982), which adopted the Secretary's position that these funds are not wages, but merely constitute a sum of money required to remedy a violation of the Fair Labor Standards Act. This court is not persuaded by *Donovan*. No matter how these funds are characterized, if they are paid to the Secretary of Labor as requested, they will be used to prefer one set of creditors in bankruptcy over other creditors. Further, not only will certain creditors of the estate be preferred to others, but assets of the estate will be released from the exclusive control of the Bankruptcy Court. This Court will not allow the clear purposes of the Bankruptcy Code to be thwarted in such a manner.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, IT IS HEREBY ORDERED that the funds currently held in the registry of the United States District

Court for the Southern District of Georgia be turned over to the Trustee to be disbursed according to the priorities of the Bankruptcy Code.

The Court recommends that the injunction granted by the United States District Court for the Southern District of Georgia on March 20, 1986, be dissolved, and IT IS FURTHER ORDERED that a copy of this Order be immediately sent to the United States District Court for action on this recommendation.

/s/ HERMAN W. COOLIDGE

HERMAN W. COOLIDGE

United States Bankruptcy Judge

Dated at Savannah, Georgia
this 6th day of November, 1986

While the matter was transferred to the bankruptcy judge for plenary disposition, there could be some ques-

tions of the ability of the bankruptcy court to modify or annul an injunction entered by a federal district judge. To the extent that any injunction granted by this court has survived the transfer of the case to the bankruptcy judge, such injunction is dissolved. The opinion of the bankruptcy judge is ADOPTED as opinion of this court with respect to all issues between the parties. This case is DISMISSED in its entirety. The clerk will enter judgment in favor of the defendant in this civil action. The parties shall bear their own costs. A true copy of this order shall be forwarded to the clerk of the bankruptcy court.

ORDER ENTERED at Augusta, Georgia, this 13th day of November, 1986.

/s/ DUDLEY H. BOWEN, JR.
United States District Judge

APPENDIX "D"

**UNITED STATES COURT OF APPEALS,
ELEVENTH CIRCUIT**

April 11, 1988

No. 87-8389

WILLIAM E. BROCK,
Secretary of Labor,
United States Department of Labor
Plaintiff-Appellant,

v.

RUSCO INDUSTRIES, INC.,
Defendant-Appellee.

**Appeal from the United States District
Court for the Southern District of Georgia.**

Before FAY and KRAVITCH, Circuit Judges, and ATKINS*, Senior District Judge.

FAY, Circuit Judge:

Prior to filing for bankruptcy, Rusco Industries, Inc. ("Rusco") violated the Fair Labor Standards Act ("FLSA") §§1-9,29 U.S.C. §§201-219 (1982), by not paying its employees for their final two weeks of work. Consequently, the Secretary of Labor brought an action in district court to prevent the sale of all the goods produced in violation of the FLSA. The district court found that the Bankruptcy Code automatically stayed the Secretary's FLSA action and dismissed the case. The Secretary appeals the dismissal, and we reverse.

I. Background

Rusco employed about 150 people in the manufacture of windows and doors. Because of financial difficulty, Rusco did not pay its employees from January 20, 1986 to February 3, 1986. On February 3, Rusco filed for reorganization under Chapter 11 of the Bankruptcy Code. 11 U.S.C. §§1101-1174 (1982).

On February 21, 1986, the Secretary filed an injunctive action under section 17 of the FLSA.¹ The Secretary alleged that Rusco would violate section 15(a)(1) of the FLSA (the "hot goods" provision) by selling goods produced by employees paid below the minimum wage.² On March 24, 1986, the district court enjoined the sale of Rusco's inventory unless Rusco deposited the proceeds of the sale into the district court's registry. Believing that bankruptcy law controlled the action, the district court transferred the case to the bankruptcy court and directed that the proceeds received from the sale of inventory be disbursed according to the future order of the bankruptcy court.

In the bankruptcy court, the Secretary of Labor moved that he receive a portion of the proceeds from the inventory in order to remove the "taint" from the "hot goods."³

¹ Section 17 gives the federal district courts the power to enjoin violations of section 15 of the FLSA. 29 U.S.C. §217(1982).

² Section 15(a)(1) provides:

(a) . . . it shall be unlawful for any person—

(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of [section 06 or section 07 of the FLSA] . . . 29 U.S.C. §215(a)(1) (1982).

³ The money required to remove the "taint" equals the minimum wage that Rusco did not pay its employees. To the extent that Rusco's debt to its employees exceeds the minimum wage, both parties agree that the employees will receive the rest of their wages in accordance with the priority scheme of the Bankruptcy Code. See 11 U.S.C. §507(a) (1982).

The bankruptcy court viewed the motion as equivalent to granting a "superlien" to the employees and ordered that the proceeds be distributed in accordance with the priorities set forth in the Bankruptcy Code. The district court then adopted the opinion of the bankruptcy judge, dissolved its previous injunction, and dismissed the action in its entirety.⁴

II. Analysis

A. The Fair Labor Standards Act⁵

[1] The FLSA mandates the payment of a minimum wage⁶ to covered employees. Section 6(a) provides that every employer, as defined in the Act, shall pay his employees at least the specified minimum wage. A manufacturer is not excused from the requirement of Section 6(a) simply because it is approaching insolvency. See *Citicorp Industrial Credit, Inc. v. Brock*, ___ U.S. ___, 107 S.Ct. 2694, 2698 n.4, 97 L.Ed.2d 23 (1987). Since Rusco does not dispute its failure to pay its employees for their final two weeks of work, we conclude that the goods produced during these final two weeks were manufactured in violation of §6 of the FLSA and are "hot goods" for the purposes of §15(a)(1).

⁴ The district court has stayed its final order and directed that the trustee place the proceeds from the sale of the inventory in an interest-bearing account until we resolve this appeal.

⁵ Our description of the FLSA patterns the description given by the Supreme Court in *Citicorp Industrial Credit, Inc. v. Brock*, ___ U.S. ___, 107 S.Ct. 2694, 97 L.Ed.2d 23 (1987).

⁶ Section 6(a) provides:

(a) Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates:

(1) . . . not less than \$3.35 an hour after December 31, 1980, except as otherwise provided in this section . . . 29 U.S.C. §206(a) (1982).

The Supreme Court has indicated that Congress's concern with the "hot goods" provision was two-fold. First, Congress sought to improve labor conditions. Second, Congress wanted "to eliminate the competitive advantage enjoyed by goods produced under substandard conditions." *Citicorp*, 107 S.Ct. at 2700. Most importantly, the Supreme Court concluded that preventing the shipment "of goods produced under substandard conditions is not simply a means to enforce other statutory goals; it is itself a central purpose of the FLSA." *Id.* at n.8 (emphasis added).

The issue before us is whether Rusco's proceeding in the bankruptcy court automatically stays an injunctive suit by the Secretary of Labor under section 17 of the FLSA. Under the FLSA, Congress clearly forbade the sale of goods manufactured in violation of the minimum wage provision. To remove the "taint" and lift the injunction, however, Rusco must pay the Secretary the minimum wages of the employees. Since the Secretary has stated that he will give the money to the employees, the practical effect of removing the "taint" will be to grant the employees' minimum wage claims a higher priority than the claims of other creditors. We recognize that this creates a tension between the FLSA and the Bankruptcy Code and that we must determine what Congress intended in light of this tension.

B. Automatic Stay

[2] Rusco's argument is that section 362 of the Bankruptcy Code stays the Secretary's action.⁷ Subsection (a)

⁷ Section 362 provides:

(a) Except as provided in subsection (b) of this section, [the filing of a bankruptcy petition] operates a stay, applicable to all entities, of—

(1) the commencement or continuation including the issuance or employment of process, of a judicial, administrative, or other proceedings against the debtor that was or could have been commenced

of section 362 effectively stays all suits besides the bankruptcy petition; subsection (b) operates as a limited exception to subsection (a). The district court believed that the automatic stay provision required it to dismiss the Secretary's injunctive action.

The district court erred in dismissing the case. The purpose behind the automatic stay provision is "to facilitate the orderly administration of the debtor's estate." *Donovan v. TMC Industries, Ltd.*, 20 B.R. 997, 1001 (N.D. Ga. 1982). The automatic stay stops collection efforts and helps relieve the debtor of final pressures. S.Rep. No. 989, 95th Cong., 2d Sess. 54-55, reprinted in 1978 U.S. Code Cong. & Admin. News 5787, 5840-41. The exception to the automatic stay, however, recognizes that the government must be able "to enforce its laws uniformly without regard to the debtor's position in the bankruptcy court." *Donovan*, 20B.R. at 1001. Consequently, Congress permitted a suit by the government "to prevent or stop violation of fraud, environmental protection, consumer protection, safety, or similar police or regulatory laws" to proceed. S.Rep. No.

before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title:

...

(b) The [filing of a bankruptcy petition] does not operate as a stay—

...

(4) under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

(5) under subsection (a)(2) of this section, of the enforcement of a judgment, other than money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

11 U.S.C. §362 (1982).

989, 95th Cong., 2d Sess. 52, reprinted in 1978 U.S. Code Cong. & Admin. News 5787, 5838. We believe that the Secretary brought this suit under his police power. The Secretary brought the suit to protect legitimate businesses from unfair competition and to enforce the federal law regarding minimum wage. Since the Secretary is suing under the government's police power, his suit is exempted from the automatic stay provisions.⁸

Not only does the exception permit the Secretary's action to proceed, but it also permits the Secretary to enforce the action. This is an injunction under section 17 to prevent the sale of "hot goods" in interstate commerce; it is not an action for damages. Congress has declared that where a governmental unit is suing under its police power, section 362(b)(5) provides an exception to an automatic stay which "extends to permit an injunction and enforcement of an injunction."⁹ Therefore, section 362 does not bar either the continuation or enforcement of an injunctive action under section 17 of the FLSA.

C. Condition Precedent

[3] We believe that Congress established the payment of a minimum wage as a condition precedent to the ship-

⁸ Other cases in which a governmental unit has used under its police powers and avoided the Bankruptcy Code's automatic stay provision are: *NLRB v. Evans Plumbing Co.*, 639 F.2d 291 (5th Cir. Unit B 1981) (per curiam) (NLRB sued debtor for unfair labor practices); *EEOC v. Rath Packing Co.*, 787 F.2d 318 (8th Cir.) (EEOC brought suit under Title VII for discriminatory hiring), cert. denied, ___ U.S. ___, 107 S.Ct. 307, 93 L.Ed.2d 282 (1986); *Penn Terra Ltd. v. Department of Env'tl. Resources*, 733 F.2d 267 (3d Cir. 1984) (state government sued to enforce its environmental statute); and *Commodity Futures Trading Comm'n v. Co Petro Mktg. Group*, 700 F.2d 1279 (9th Cir. 1983) (CFTC sued to stop violations of the Commodities Exchange Act).

⁹ S.Rep. No. 989, 95th Cong., 2d Sess. 52, reprinted in 1978 U.S. Code Cong. & Admin. News 5787, 5838 (emphasis added). Subsection (b)(5) also allows a governmental unit to obtain the entry of a money judgment, but not the enforcement of the money judgment, *Id.*

ment of manufactured goods. As the Supreme Court pointed out in *Citicorp*, Congress has banned many products from interstate commerce that are not produced in conformance with specified standards. 107 S.Ct. at 2701. Some of these banned goods include misbranded hazardous substances, 15 U.S.C. §1263(a) (1982), misbranded food, drug, and cosmetics, 21 U.S.C. §§33(a)-(c), (1982), and uninspected poultry products 21 U.S.C. §§458(a)(2) (1982). It is indisputable that a company's bankrupt status would not override Congress's insistence on the inspection of poultry or the proper branding of hazardous substances. Because of its concern about public safety, Congress established the inspection and branding of these products as conditions precedent to their sale. Thus, the bankrupt can choose between paying for the inspection and branding or keeping the products in storage.

Similarly, Congress established a condition precedent to the sale of manufactured products. Congress was concerned that the unrestricted sale of goods produced under substandard labor conditions would further erode working conditions throughout the country.

Congress had found that substandard wages and excessive hours, when imposed on employees of a company shipping goods into other States, gave the exporting company an advantage over companies in the importing States. Having so found, Congress decided as a matter of policy that such an advantage in interstate competition was an "unfair" one, and one that had the additional undesirable effect of driving down labor conditions in the importing States. *Maryland v. Wirtz*, 392 U.S. 183, 189, 88 S.Ct. 2017, 2020, 20 L.Ed.2d 1020 (1968). Consequently, Congress required manufacturers to comply with the minimum wage provision of the FLSA or to keep their products out of interstate commerce. Therefore, we believe Congress intended to keep "hot goods" out of interstate commerce in spite of the Bankruptcy Code, exactly as it would uninspected poultry or misbranded drugs.

III. Conclusion

We believe that the Secretary of Labor's action is exempted from the Bankruptcy Code's automatic stay provision and that Congress intended to prevent the sale of "hot goods" in interstate commerce even when the manufacturer has filed for bankruptcy. Therefore, we reverse the district court's dismissal of the case, we vacate the order transferring the funds to the bankruptcy court, and remand for the payment of so much of the funds as necessary to remove the "taint."

REVERSED, VACATED and REMANDED.